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No. 73-1689

# In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, APPELLANT

*v.*

AMERICAN BUILDING MAINTENANCE INDUSTRIES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Appellee's principal legal argument that in Section 7 of the Clayton Act Congress did not fully exercise its power to regulate commerce is answered in our jurisdictional statement and our brief *amicus curiae* in *Gulf Oil Corp.* v. *Copp Paving Co.*, No. 73-1012 (a copy of which has been served upon appellee's counsel). The Fair Labor Standards Act cases upon which appellee relies are irrelevant because in that Act Congress did not exercise its power to regulate local activities affecting commerce (see *Kirschbaum Co.* v. *Walling*, 316 U.S. 517), while in Section 7 of the Clayton Act it did.

We are filing this brief to answer appellee's contentions that the particular activities involved in this case did not significantly affect commerce.

The activities of Benton, the acquired firm, affect commerce because of Benton's purchase of goods originating in other states. Appellee's attempt to avoid this basis for applying the statute on the ground that Benton purchased through local suppliers (Motion to Affirm, pp. 15-16) is unsound. The distinction between direct and indirect purchases would be relevant only in determining "flow of commerce" jurisdiction. See *Burke* v. *Ford,* 389 U.S. 320, 321; *Rasmussen* v. *American Dairy Assoc.,* 472 F.2d 517, 526 (C.A. 9). Both direct and indirect purchases may substantially "affect" commerce. See, *e.g., Wickard* v. *Filburn,* 317 U.S. 111.

Appellee also asserts that Benton's purchases did not have a significant effect upon commerce because they represent a relatively small portion of Benton's costs (Motion to Affirm, p. 16). The effect of Benton's purchases cannot be determined on that basis, however; the proper inquiry is the substantiality of the purchases in dollar amount. Benton paid more than $150,000 per year to purchase or lease goods manufactured in other states. Such expenditures represent a substantial amount of interstate commerce. See *Katzenbach* v. *McClung,* 379 U.S. 294; cf. *Fortner Enterprises* v. *U.S. Steel,* 394 U.S. 495.[1]

The services that Benton performed for its customers also had a significant effect upon the flow of commerce. Benton's customers included several of the country's leading corporations, which had substantial interstate and international sales. The price and quality of the janitorial services those corporations purchase necessarily have an impact on their operations.

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[1]In *Katzenbach* v. *McClung* this Court upheld the application of the Civil Rights Act of 1964 to a restaurant which purchased $70,000 worth of meat per year which had originated in other states. All purchases were made through a local supplier. In *Fortner Enterprises* the Court concluded that a tying arrangement involving annual sales of $190,000 represented a substantial volume of commerce in the tied product. The Court said that "we cannot agree with respondents that a sum of almost $200,000 is paltry or 'insubstantial'." *Id.* at 502.



Finally, although Benton's janitorial services were performed locally, Benton was nevertheless engaged in interstate commerce because it conducted interstate negotiations in selling its services. Appellee claims that these interstate negotiations are not a significant factor since the cost of the interstate messages was *de minimis* (Motion to Affirm, p. 18). We submit that the significant fact is the existence of such interstate negotiations rather than their cost.

Benton was "engaged in commerce" within the meaning of Section 7 of the Clayton Act for the reasons stated herein and in the jurisdictional statement.

It is therefore respectfully submitted that the motion to affirm be denied and probable jurisdiction noted.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1974.